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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 793

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

BRIEF OF APPELLANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN OPPOSITION TO MOTIONS OF APPELLEES TO AFFIRM OR TO DISMISS.

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The Scheffer Press, Inc.—ANdover 3-6850

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Appellees.

BRIEF OF APPELLANT, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN OPPOSITION TO MOTIONS OF APPELLEES TO AFFIRM OR TO DISMISS.

SUMMARY OF ARGUMENT.

I.

This Court has jurisdiction of the present direct appeal from the district court's order of December 24, 1958, under 28 U.S.C.A., Section 1253, even though such order did not grant or deny a temporary or permanent injunction. The order appealed from was entered during the course of proceedings which were supplementary to, and an

integral part of, litigation which granted a permanent injunction and which heretofore has come to this Court on direct appeal. This order was entered ostensibly to enforce the rights and obligations of the parties which arose in the main litigation. Under such circumstances jurisdiction of the present appeal is attributable to the jurisdiction of the principal cause. Appellees cite no decisions to the contrary.

II.

The parties' rights in the unclaimed fares were not determined by the agreed order of June 18, 1956. The unclaimed fund, the present subject of this litigation, was not then in existence. The doctrine of *res judicata,* therefore, does not apply. There has been no adjudication on the merits; hence appellant is not estopped by its consent to the order of June 18, 1956, from asserting its right to the unclaimed fares, and the lower court erred in holding that such order finally determined the parties' rights thereto.

III.

The parties' rights to the unclaimed fund were not in issue in February, 1958, but only the right of the patrons to receive immediate refunds from the impounded fares. No unclaimed fund existed in February, 1958. Appellant is not now estopped to contest appellees' rights to the unclaimed fares and to assert its own right thereto.

IV.

The cases cited in appellant's Jurisdictional Statement, pages 8-12, are in point on both facts and law with the instant litigation and cannot be distinguished herefrom. The terms of the order vacating the order entered by the

Interstate Commerce Commission on October 31, 1958, clearly indicates that its report and its findings of the same date were not vacated or stricken from the record but remain in full effect. The vacating order was entered pursuant to the policy of that Commission to observe the principles of comity so that the states may exercise jurisdiction of purely intrastate matters. Appellant's right to receive all of the now unclaimed fares remains confirmed by the Commission's findings of October 31, 1958, under the decisions of this Court on which appellant relies. Such an effect does not involve an objectionable retroactive application of the Commission's said order.

ARGUMENT.

I.

This Court Has Jurisdiction of This Direct Appeal from the District Court's Order of December 24, 1958.

A. The Questions Presented in This Appeal Are an Integral Part of Litigation Involving Injunctive Relief.

Appellee Commuters' Association does not question this Court's jurisdiction on this appeal. Appellees, the State of Illinois and Illinois Commerce Commission, suggest that a direct appeal to this Court does not lie from the three-judge district court's order of December 24, 1958, because such order did not grant or deny either an interlocutory or a permanent injunction. Brief of State of Illinois, 7-8. Where, however, an order has been entered during the course of proceedings properly before a duly constituted three-judge court and the main proceedings resulted in granting or denying injunctive relief, then the appeal from such order lies directly to this Court. The cases cited by appellant at pages 3 and 4 of its Jurisdictional Statement are authority for this view.

Arkadelphia Co. v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134, 39 S.Ct. 237, 63 L.ed. 517 (1919), involved a suit against a state railroad commission and other state officials for injunctions to restrain the enforcement of certain reduced rates promulgated by the commission. Injunctive relief was decreed in accordance with the petitions. When such decrees were reversed and the cause remanded pursuant to *Allen* v. *St. Louis, Iron Mt. & S. R. Co.*, 230 U.S. 553, 33 S.Ct. 1030, 57 L.ed. 1625 (1913), the lower court referred to a master the issue of the amount of damages sustained by the commissioners. Certain shippers intervened and

presented claims for refunds of charges paid by them during the period between entry of the temporary injunction and the reversal of the decrees. When the district court approved the master's report allowing such claims, various railroads perfected appeals both to this Court and to the circuit court of appeals.

At the outset the question was raised whether the decree allowing the claims was a proper subject of direct appeal to this Court. Mr. Justice Pitney held on behalf of this Court, at 249 U.S. 142, 63 L.ed. 523:

> "The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence that where jurisdiction of the main cause is predicated solely on diversity of citizenship and the decree therein is for this reason made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation also are final."

At the same page, the Court also said:

> "The proceeding out of which the decree now in question arose was not merely ancillary but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this court reversing the final decrees in the main causes and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of

> the United States and as being made in a case in which a state law was claimed to be in contravention of the Federal Constitution, within the meaning of § 238, Judicial Code."

Similarly in the instant cause, the order appealed from, based as it is upon the order of June 18, 1956, arose out of and during the proceedings which led to the injunction decreed on June 14, 1956, pursuant to *State of Illinois* v. *United States*, 146 F.Supp. 195 (D.C. N.D. Ill., 1956). That decree already has been reviewed by this Court on direct appeal. *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, 78 S.Ct. 304, 2 L.ed. 2d 292 (1958). The instant appeal properly invokes the jurisdiction of this Court as attributable "to the jurisdiction upon which the main suit rested".

A similar case is *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 49 S.Ct. 492, 73 L.ed. 954 (1929). This litigation began by a petition to set aside and enjoin enforcement of an order of the Interstate Commerce Commission requiring absorption of certain transfer charges. *Chicago, R.I. & P. Ry. Co.* v. *B. & O. R.R. Co.*, 113 I.C.C. 681 (1926). A three-judge district court dismissed the suit for want of equity, and, on direct appeal to this Court, was reversed. *Baltimore & O. R. R.* v. *United States*, 277 U.S. 291, 48 S.Ct. 520, 72 L.ed. 885 (1928). The Baltimore and Ohio Company and others applied to the district court for a decree in conformity to the mandate of this Court. Appellants alleged they had been obliged to comply with the Commission's erroneous decree until it was set aside by this Court and prayed for restitution of the transfer charges they had paid in the interim. The three-judge court denied the application for restitution, and appellants appealed directly to this Court.

Citing the *Arkadelphia* decision, this Court said at page 783 of 279 U.S., 956 of 73 L.ed.:

"Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. *Ex parte United States, supra,* 424. *Ex parte Metropolitan Water Co.,* 220 U.S. 539, 544. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first."

Thus the decree appealed from, like that in the cause at bar, did not involve the granting or denying of injunctive relief. But this Court took jurisdiction of the direct appeal because the restitution issue was incidental to and a part of the principal suit. So here, the parties' rights in the unclaimed fares are a part of the main litigation in the instant cause.

Atlantic Coast Line v. *Florida,* 295 U.S. 301, 55 S.Ct. 713, 79 L.ed. 1451 (1935), is another instance of a direct appeal to this Court from an order which did not grant or deny an injunction. The Interstate Commerce Commission enjoined the maintenance of certain low rates which it found resulted in unjust discrimination against interstate commerce. When the railroads accordingly established higher rates, the State of Florida and others sued before a three-judge district court to set aside and enjoin enforcement of the Commissioner's order. The district court dismissed the bills, *State of Florida* v. *United States,* 30 F.2d 116 (D.C. N.D. Ga., 1929) *supplemental opinion rendered,* 31 F.2d 580; but on direct appeal, this Court reversed, because the Commission's report did not contain certain necessary findings. *Florida* v. *United States,* 282 U.S. 194, 51 S.Ct. 119, 75 L.ed. 291 (1931). On

remand the Commission heard new evidence and made new findings, on the basis of which it prescribed the same increased fares which it had first promulgated. This second order was also attacked in the district court, and the bills were again dismissed. *State of Florida* v. *United States,* 4 F.Supp. 477 (D.C.N.D. Ga., 1933). This Court affirmed in *Florida* v. *United States,* 292 U.S. 1, 54 S.Ct. 603, 78 L.ed. 1077 (1934).

During the course of the litigation certain shippers brought a separate suit for restitution of the difference between the former lower rate and the increased rate which had been exacted during the litigation. Pursuant to a master's report, the district court decreed restitution of nearly $100,000.00. *State of Florida* v. *United States,* 11 F.Supp. 36 (D.C.N.D. Ga., 1934) Cross appeals were taken directly to this Court. The question of this Court's jurisdiction of such appeals was not discussed in the opinion other than the citation of the *Arkadelphia* and *Baltimore and Ohio* decisions at 295 U.S. 308, 79 L.ed. 1457.

This Court thus took jurisdiction of a direct appeal from an order entered in a proceeding entirely separate from the main litigation. The separate suit, although in equity, sought, not an injunction, but a money judgment. In the *Atlantic Coast Line* case, it was a sufficient basis for this Court's jurisdiction that the cause of action arose out of conditions brought about by the principal litigation. That the order appealed from was entered in another action did not impede the appellate jurisdiction of this Court.

Inland Steel Co. v. *U.S.,* 306 U.S. 153, 59 S.Ct. 415, 83 L.ed. 557 (1939), involved a similar issue of which this Court took jurisdiction on direct appeal. The suit in the lower court was brought to set aside and enjoin en-

forcement of an order of the Interstate Commerce Commission prohibiting a railroad's payment of unlawful switching allowances to certain steel industries pursuant to a tariff provision. The three-judge court stayed the Commission's order by an interlocutory injunction providing that the allowances becoming due and payable during the litigation should be held by the railroad pending the court's further order. The district court subsequently dismissed the petition, dissolved the injunction, and ordered the accrued allowances to be retained by the railroad. *Inland Steel Co.* v. *United States*, 23 F. Supp. 291 (D.C.N.D. Ill., 1938).

On direct appeal to this Court, Mr. Justice Black indicated that no question of the granting or denying of an injunction was involved. At pages 155-156 of 306 U.S., 560 of 83 L.ed., the opinion stated:

> "Appellant concedes the correctness of the District Court's decree holding the Commission's order valid, dismissing the petition and denying a permanent injunction. The appeal only seeks a review of the court's action in ordering that the unlawful allowances accumulated after the date of the interlocutory injunction be retained by the Railroad and not paid to appellant."

As in the instant case, the question before this Court on direct appeal related only to the equitable propriety of the lower court's distribution of the funds accumulated during the litigation of the validity of the Commission's order.

Jurisdiction of another direct appeal involving the disposition of accumulated funds was accepted by this Court in *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939). The principal litigation arose when the Secretary of Agriculture issued an order under

the Packers and Stockyards Act, 42 Stat. 159, 7 U.S.C. Secs. 181-229, condemning certain rates of market agencies at the Kansas City stockyards and prescribing lower rates for the future. In a suit to set aside this order, the three-judge district court temporarily restrained its enforcement pending a determination on the merits, but upon condition that the market agencies in the interim should deposit in court the excess of their rates over those prescribed in the Secretary's order. On two previous direct appeals this Court held that a full hearing had not been accorded the parties and twice remanded the cause to the Secretary for further proceedings. *Morgan* v. *United States,* 298 U.S. 468, 56 S.Ct. 906, 80 L.ed. 1288 (1936); 304 U.S. 1, 23, 58 S.Ct. 773, 999, 82 L.ed. 1129, 1135 (1938).

After further action by the Secretary had begun on the second remand, appellants moved to stay further proceedings in the district court and to direct retention of the impounded funds until the Secretary should have entered a final order. The lower court denied this motion, but it granted a counter-motion by appellees to distribute the fund among them. *Morgan* v. *United States,* 24 F.Supp. 214 (D.C.W.D. Mo., 1938). This Court accepted jurisdiction on direct appeal.

The similarity of the *Morgan* case to the instant cause is striking. Both raised the question of the proper disposition of a fund in court. Both funds were created and accumulated during the course of litigation involving injunctive relief. Although not essential to final adjudication of the principal litigation, the questions on both appeals were initiated by motion in the lower court.

Mr. Justice Stone suggested a basic reason for treating such ancillary matters as part of the main litigation when he stated in the *Morgan* decision, at 307 U.S. 191, 83 L.ed. 1217, that:

> " . . . in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, [the District Court] assumes the duty of making disposition of the fund in conformity to equitable principles."

Just as this Court took jurisdiction of the direct appeals in the above cases on the ground that the questions arose from, and were a part of, the main litigation involving the granting or denying of injunctive relief, so should jurisdiction be taken of this direct appeal. The cases cited above are in point with this on their facts and are authority for such result.

B. Authority Cited By Appellees Is Not in Point to Deny This Court's Jurisdiction.

Appellees, the State of Illinois and Illinois Commerce Commission, rely on five decisions at pages 7-8 of their Motion to Affirm or Dismiss which they allege to be authority for dismissing this appeal because jurisdiction is lacking but these decisions are not applicable to the instant appeal. In four of appellees' cases, this Court was obliged to deny jurisdiction of a direct appeal because the three-judge lower court did not itself have jurisdiction.

In the fifth case, *Pub. Serv. Com'n* v. *Brashear Lines*, 306 U.S. 204, 59 S.Ct. 480, 83 L.ed. 608 (1939), no controversy was involved because appellant had prevailed below. In this suit to enjoin officials and agencies of the State of Missouri from enforcing allegedly unconstitutional provisions of that state's Bus and Truck Law, appellants counterclaimed for fees and licenses which respondents owed. The three-judge court found the Bus and Truck Law constitutional and dismissed the bill. *Brashear Freight Lines* v. *Public Service Commission*, 23

F.Supp. 865 (D.C.W.D. Mo., 1938). It also dismissed the counterclaim, as this Court stated in *Pub. Serv. Com'n v. Brashear Lines,* 312 U.S. 621, at 623-624, 61 S.Ct. 784, 85 L.ed. 1083, at 1085 (1941):

> ". . . because of 'serious doubt as to the right of the defendants to maintain' such an action."

Plaintiffs below did not appeal, but respondents appealed directly to this Court from the dismissal of their counterclaims.

This appeal was dismissed for lack of jurisdiction on the ground that appellants were the successful parties below in that the bill for an injunction against them had been dismissed. The *per curiam* opinion of this Court held, at 306 U.S. 207, 83 L.ed. 610:

> ". . . as no appeal has been taken to review the decree denying the injunction, this Court is without jurisdiction."

Thus the first appeal in the *Brashear* case is strikingly dissimilar from the instant cause in that: (1) this appellant was not the successful party in the litigation below; and, (2) the present issues are not presented in the form of a counterclaim comprising an entirely different cause of action. A separate suit to obtain the presently unclaimed funds would command scant attention from any court.

After the first appeal had been dismissed, petitioners in the *Brashear* litigation moved for assessment of damages in the district court. This motion was denied on the ground, as stated by this Court at 312 U.S. 624, 85 L.ed. 1085-1086, that:

> ". . . the questions presented by the motion for damages had been ruled upon and finally determined by the judgment dismissing the original counterclaim."

The circuit court of appeals affirmed on the grounds, *inter alia*, that the counterclaim raised issues separable from the original litigation and that such claim was not appropriate for consideration by a three-judge court. *Public Service Com'n.* v. *Brashear Freight Lines*, 114 F.2d 1 (C.C.A. 8, 1940). On certiorari, this Court affirmed the separability of the damage questions from the principal litigation and held, at 312 U.S. 625, 85 L.ed. 1086, that:

> "Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judge requirement of § 266 had no application."

It has never been suggested in this litigation that a single judge should have heard appellant's motion for a stay of the decree of June 14, 1956, or the proceedings on and subsequent to September 12, 1958. The reason is that the present issues are not separable from the proceedings in which the injunction of June 14, 1956, was decreed and that they were properly considered by the three-judge court as essential to complete equitable relief without multiplicity of litigation. In the second *Brashear* decision, at note 5, 312 U.S. 625-626, 85 L.ed. 1086, this Court stated:

> "A District Court composed of three judges under § 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties. *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391; *Sterling* v. *Constantin*, 287 U. S. 378, 393-394."

Public Service Commission v. *Columbia Terminals*, 309 U.S. 620, 60 S.Ct. 471, 84 L.ed. 984 (1940), is merely a memorandum decision. The opinion of the lower Court,

Columbia Terminals Co. v. *Lambert,* 30 F. Supp. 28 (D.C. E.D. Mo., 1939), indicates that this case likewise has no bearing on the present issue. Jurisdiction of the three-judge court was predicated on the allegation that a state statute was unconstitutional and void under the commerce clause, U.S. Const., Art. I, Sec. 8. The district court dismissed the proceeding for want of jurisdiction because plaintiff had failed to exhaust his administrative remedies.

The Court stated at 30 F.Supp. 34:

> "The plaintiff has neglected to make application for a permit covering its operations in which the arrests of its drivers occurred since 1931, when the statute became effective. Until it does so, it is not in a position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief • • • until the prescribed administrative remedy has been exhausted.' *Myers* v. *Bethlehem Corp.,* 303 U.S. 41, 50, 51, 58 S. Ct. 459, 463, 82 L. Ed. 638. And, where the defect in the bill is incapable of remedy by amendment, its dismissal must be ordered."

The lower Court itself had no jurisdiction of the action, and jurisdiction on direct appeal could not be conferred by this Court.

This also is not in point with the instant appeal. Here, there is no doubt that the three-judge court properly assumed jurisdiction of the cause presented and properly continued to exercise it until all issues pertaining to the injunctive relief requested were determined. There has never been a question that any party hereto has failed to exhaust its administrative remedies.

Phillips v. *United States,* 312 U.S. 246, 61 S.Ct. 480, 85 L.ed. 800 (1941), also is not applicable to the instant cause. The case began by a petition for an injunction

against state officials to restrain their interference with a federal flood control development. The three-judge district court decreed an interlocutory injunction. *United States* v. *Phillips,* 33 F.Supp. 261 (D.C.N.D. Okla., 1940). On direct appeal, Mr. Justice Frankfurter formulated the sole issue involved at 312 U.S. 248, 85 L.ed. 803, in the following terms:

> "But unless § 266 required the present suit to be heard by three judges, under the Jurisdictional Act of 1925 we are without authority to entertain this direct appeal from a district court. § 238 of the Judicial Code as amended, 28 U. S. C. § 345. Having concluded that there is a fatal bar to our entertaining the appeal, we are without power to consider the other issues that were argued here."

At page 253 of 312 U.S., 806 of 85 L.ed., the decision held:

> "In short, this is not a case for which the procedural structure of § 266 was devised."

Thus, the *Phillips* case was dismissed because it had not been properly before a three-judge court. As in other cases cited by appellee, the three judge district court originally had no jurisdiction of the initial suit.

American Insurance Company v. *Lucas,* 314 U.S. 575, 62 S.Ct. 75, 86 L.ed. 466 (1941), is only a memorandum opinion. The facts of this case appear from the opinions of the lower court, *American Ins. Co.* v. *Lucas,* 38 F.Supp. 896, 926 (D.C.W.D. Mo., 1940). To the extent that this case conflicts, if at all, with the decisions cited by appellant, at pages 4 to 11 hereof, the latter here are controlling as presenting factual situations and questions of law more closely akin to those in the instant proceeding.

The *Lucas* case is not inconsistent with acceptance of jurisdiction of this appeal. Any disposition of the unclaimed fares, as well as the order under which they

were collected, is an integral part of the original litigation which led to an injunction and review thereof by this Court on direct appeal. The object of appellant's motion of September 12, 1958, could not have been obtained by prosecuting a new, separate suit. The issue of the proper disposition of the unclaimed fares cannot be so divorced from the litigation which created them. The present issues, therefore, must be deemed a part of the original litigation herein and must be subject to the same appellate jurisdiction.

II.

The Order of June 18, 1956, Does Not Foreclose Appellants' Right To The Unclaimed Fares.

Appellees contend that the questions raised by this appeal are unsubstantial and that the order appealed from therefore should be affirmed because the order of June 18, 1956, was entered with the consent of appellant's counsel. Appellees suggest that such consent has bound appellant to the terms of that order so far as paragraph 6 relates to disposition of the unclaimed fares now in the control of the district court and that appellant therefore is not entitled to so much thereof as represent "reasonable expenses (including reasonable attorneys' fees) incurred" by appellees on account of this protracted litigation.

Appellant contends, on the contrary, that it is entitled to all of the unclaimed fares pursuant to previous decisions of this Court. The order of June 18, 1956, did not adjudicate and settle the rights of appellees in the unclaimed fund, and appellant's consent to that order, therefore, does not create or finally establish any rights thereto.

A. Res Judicata Does Not Apply Because No Rights in the Unclaimed Fares Were Adjudicated by the Order of June 18, 1956.

Appellees' contention that they are entitled as a matter of right to attorneys' fees out of the unclaimed fares is based wholly, as it must be, upon paragraph 6 of the order of June 18, 1956, Appendix D, Jurisdictional Statement, page 23a *et seq.* The parenthetical clause in that paragraph constitutes the only mention of attorneys' fees during nearly four years of litigation before the Interstate Commerce Commission and in the federal courts prior to September 12, 1958. No other pleading or order and no testimony or oral argument prior to appellant's motion on such date referred, directly or indirectly, to unclaimed fares or to either appellant's or appellees' rights therein.

When the order of June 18, 1956, was entered, no unclaimed fund was in existence to which anyone could have a right. The question of whether appellant's equity in the unclaimed fares is superior to appellees' right to attorneys' fees did not arise until it became certain that refunds would have to be made and until, in fact, an unclaimed balance remained at the close of the refund period. This was not until September 12, 1958, when appellant filed its report in the District Court indicating the existence of unclaimed fares. Until then it was only a speculative possibility that any of the impounded fares would not be claimed.

Such was the holding in a case involving similar facts. *Illinois Bell Telephone Co.* v. *Slattery,* 98 F.2d 930 (C.C.A. 7, 1938), *supplemental opinion rendered,* 102 F.2d 58 (1939). In prior litigation this Court had required the utility to make refunds of overcharges collected during litigation of the validity of a state commission rate order.

Lindheimer v. *Illinois Tel. Co.*, 292 U.S. 151, 54 S.Ct. 658, 78 L.ed. 1182 (1934). The refunds were made in due course and afterwards there remained a substantial amount unclaimed. In the *Slattery* case the state sought the unclaimed fund under the doctrine of *bona vacentia*. The utility opposed the claim on the ground of the attorney general's acquiescence in an earlier order which allegedly vested the right to such unclaimed charges in the utility. It was contended, as it now is in this case, that such order had settled the issue of the respective rights of the parties in the unclaimed fund.

The court of appeals held that *bona vacentia* did not apply in the case; but it also held that the issue of rights in the unclaimed portion of the fund did not arise until such a fund was found to be in existence. At 98 F.2d 933, the court stated that the question of rights in such fund:

> ". . . was not an issue between the parties to the original suit and was not involved in the original appeal to the Supreme Court. The question did not arise until June 1, 1937, when some $1,600,000 was found to remain unclaimed."

This Court denied certiorari. *Slattery* v. *Illinois Bell Telephone Co.*, 307 U.S. 648, 59 S.Ct. 1045, 83 L.ed. 1527 (1939).

Appellant contends, on the authority of the *Slattery* litigation, that any attempted adjudication of rights to the unclaimed fund in June, 1956, would have been a nullity. The non-existence of the subject matter of such an adjudication would have made the issue moot, as in an action in *rem* where the *res* was not in existence. *United States* v. *3 Unlabeled 25-Pound Bags Dried Mushrooms*, 157 F.2d 722 (C.C.A. 7, 1946). Mushrooms were there libeled under the Federal Food, Drug and Cosmetic Act,

52 Stat. 1040 *et seq.*, 21 U.S.C. Secs. 301-392, and destroyed pursuant to a judgment of the lower court. Thereafter, a motion for a new trial and vacation of that judgment was denied. On appeal the court held the existence of the mushrooms to be essential to the proceeding at 157 F.2d 723:

> "If we were to affirm the judgment, the District Court could not destroy the mushrooms. They have already been destroyed. If we reversed the judgment, there would be no mushrooms to restore to the claimant. The cause is clearly moot. We are not authorized to decide arguments but only 'cases and controversies.'"

Similarly the *res* consisting of the unclaimed fares was not in existence at the time the stay order was entered on June 18, 1956. Any determination of rights therein, at that time, similarly would have been moot.

Nor would it have been possible for appellant to prosecute an appeal from the stay order. It would not have constituted a "case or controversy". This is apparent from the *Slattery* case, at 102 F.2d 65, where the court said:

> "In fact, it could not be determined until June 1, 1937, that any of such funds would remain in the possession of the plaintiff. For the Attorney General to have raised the question at the time of the entry of the decree would, perhaps, have resulted in nothing more than delay and confusion in the adoption of the plan proposed. What reason would have moved a court at that time to consider a question, the relevancy of which could not be ascertained until three years later? We apprehend that an appeal from that decree, raising the question as to the rights which the state might have after the expiration of the three year period, would have received scant consideration in an appellate tribunal."

The same point was made in *Colley* v. *Wolcott*, 187 Fed. 595, at 597 (C.C.A. 8, 1911), where the court referred to the prior order which there purported to allow attorneys' fees:

> "It was, therefore, not such a final determination of the matter as amounted to an adjudication from which an appeal would lie before the final decree was entered in the case. Something was left to be done before the order could be executed."

In the present cause nearly two years of litigation remained to be completed after entry of the stay order before paragraph 6 could be executed. Similarly an appeal would not lie from paragraph 6 of the order, because it was impossible for an appeal then to settle the question of rights to a nonexistent unclaimed balance.

There was not, nor could there have been, in June, 1956, an issue regarding any rights in the now unclaimed fares. Appellees, therefore, cannot assert the doctrine of *res judicata* respecting their rights to receive attorneys' fees from the unclaimed fares. Their arguments must rest solely on estoppel by the bare consent of appellant to the order as a whole.

B. Appellant Is Not Estopped by Its Consent to the Order of June 18, 1956, to Assert Its Right to the Unclaimed Fares.

Where there has been no adjudication of a matter, any agreement relating thereto, although it be incorporated in an agreed order, does not estop subsequent judicial inquiry into the merits of the matter. Appellant so contends on the basis of the following authority.

In *U. S.* v. *International Building Co.*, 345 U.S. 502, 73 S.Ct. 807, 97 L.ed. 1182 (1953), a tax deficiency had been assessed against appellee on the ground it had claimed

an excessive depreciation basis during 1933, 1938 and 1939. In the Tax Court proceedings a stipulation specified there were no deficiencies for the taxable years in question, and the assessments were abated. Judgment was entered thereupon although no hearings were held, no stipulations of fact were entered, and no briefs were filed or arguments heard. Similar deficiencies were assessed thereafter for other taxable years. The company sued for their recovery asserting that the prior judgment pursuant to the stipulation was *res judicata* to the question raised in the later suit. This Court held through Mr. Justice Douglas, at 345 U.S. 505-506, 97 L.ed. 1188:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see *Russell* v. *Place*, 94 U. S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration. Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938 and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would

> forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. See *Commissioner* v. *Sunnen, supra,* at 598. A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."

Thus, consent to an order does not constitute collateral estoppel against later litigation of an issue which has not been judicially determined on its merits. In the case at bar, the district court's acceptance of the agreed order did not constitute an adjudication on the merits of appellees' rights to attorneys' fees.

Trapp v. *United States,* 177 F.2d 1 (C.C.A. 10, 1949), is also similar. It was a suit to recover income tax deficiencies paid under protest. In 1940 Trapp had treated income from oil and gas leases as community income, but the Commissioner of Internal Revenue redetermined it to be income of the taxpayer. The complaint alleged an estoppel by judgment in that the Board of Tax Appeals had determined in 1935 that income from Trapp's leases constituted community income. The court, at 177 F.2d 5, described the prior proceeding as follows:

> "The record before us fails to indicate that an answer was filed in the proceeding or that any issue of fact or law was otherwise joined. Negotiations between the parties were had and the deficiency was calculated according to the contentions of the taxpayer. But there was no trial, and no stipulation of facts was filed. The parties stipulated in writing that there was a deficiency due in a specified amount and that decision might be rendered accordingly. But the

> stipulation did not set forth any of the basic facts on which that conclusion was based. Reciting that it was entered pursuant to the written stipulation of the parties, decision was entered for the agreed amount. A judgment, not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right. Fruehauf Trailer Co. v. Gilmore, 10 Cir., 167 F. 2d 324. And a decision of that kind rendered by the Tax Court will not support a plea of estoppel in a case of this nature involving liability for income tax for a different year."

This Court denied certiorari. *Trapp* v. *United States*, 339 U.S. 913, 70 S.Ct. 573, 94 L.ed. 1339 (1950).

Still another decision of the same tenor is *Lawler* v. *National Screen Service*, 349 U.S. 322, 75 S.Ct. 865, 99 L.ed. 1122 (1955). This was a suit for treble damages for violation of the federal anti-trust laws. A prior suit for a similar violation had been settled prior to trial. At 349 U.S. 324, 99 L.ed. 1125-1126, this court stated:

> "In 1943, prior to any trial, the suit was settled. The basis of the settlement was an agreement by National Screen to furnish the plaintiffs with all standard accessories distributed by National Screen pursuant to its exclusive license agreements with producers, including exclusive license agreements which might be executed in the future. In exchange, the plaintiffs agreed that they would withdraw the suit and that they would pay National Screen for the materials at specified prices. Pursuant to the settlement, the suit was dismissed 'with prejudice' by court order. No findings of fact or law were made."

The court of appeals in the decision below, *Lawler* v. *National Screen Service Corp.*, 211 F.2d 934, at 935 (U.S.C.A. 3, 1954), stated:

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter."

Although this Court reversed on other grounds, Mr. Chief Justice Warren stated, at 349 U.S. 327, 99 L.ed. 1127:

> "It is of course true that the 1943 judgment dismissing the previous suit 'with prejudice' bars a later suit on the same cause of action. It is likewise true that the judgment was unaccompanied by findings and hence did not bind the parties on any issue—such as the legality of the exclusive license agreements or their effect on petitioners' business—which might arise in connection with another cause of action. To this extent we are in accord with the decision below."

On the basis of the above authority, appellant contends that its consent to the order of June 18, 1956, is not decisive of the question of rights in the unclaimed fund. The provisions of paragraph 6 of that order were never judicially determined. The status of the ownership of the unclaimed fares, therefore, is as if paragraph 6 had been omitted from the order of June 18, 1956.

Lawrence M'f'g Co. v. *Janesville Mills,* 138 U.S. 552, 11 S.Ct. 402, 34 L.ed. 1005 (1891), was an action seeking to enforce a consent decree entered pursuant to an agreement between the parties in a suit to enjoin defendant's use of the trademark "LL". The agreement provided that defendant and its successors and assigns would not use the trademark in consideration of plaintiff's discontinuance of the suit and release of damage claims. The consent decree, however, did not in terms enjoin defendant's successors and assigns, and when appellee succeeded to defendant's interest in the business, it proceeded to use the trademark. The Lawrence Company then brought

suit to have the incomplete decree "pieced out" and enforced against appellee. The lower court refused to do so and dismissed the bill.

On appeal, this Court referred to *Lawrence M'f'g Co. v. Tennessee M'f'g Co.*, 138 U.S. 537, 11 S.Ct. 396, 34 L.ed. 997 (1891), an entirely separate proceeding against a different defendant, which established that the Lawrence Company was not entitled to the exclusive right to use the trademark "LL". In the *Janesville* case, this Court held at 138 U.S. 560, 34 L.ed. 1008, that:

> ". . . that decision is controlling here so far as those questions can be considered as involved."

Mr. Chief Justice Fuller, at 138 U.S. 561, 34 L.ed. 1008-1009, then considered the effect of the consent which underlay the former decree:

> "But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps, the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitf. Ch. Pl. 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree."

At page 562 of 138 U.S., 1009 of 34 L.ed., the decision stated the reason for such treatment of the consent:

> "As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the Circuit Court, being correct upon the merits, is also correct in that the court refused to be constrained by the previous erroneous consent decree, to decree contrary to the right of the cause."

Thus, the basic question before this Court in the *Janesville* case is the same question raised by the instant appeal: whether consent to an order estops a party from contesting a provision thereof when such provision is contrary to law. In this appeal, as stated in appellant's Jurisdictional Statement, pages 8-12, the allowance of attorneys' fees from the unclaimed fares is contrary to the rule of *Atlantic Coast Line* v. *Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.ed. 1451 (1935); *Inland Steel Co.* v. *U.S.*, 306 U.S. 153, 59 S.Ct. 415, 83 L.ed. 557 (1939); and *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939), and contrary, also, to the rule of *Trustees* v. *Greenough*, 105 U.S. 527, 26 L.ed. 1157 (1882), and *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.ed. 1184 (1939).

Paragraph 6 of the order of June 18, 1956, is not self-executing and, in any event, must come again under the scrutiny of a court to become effective. It is immaterial whether this be done by a petition for the allowance of attorneys' fees as contemplated by the decision of the district court, *State* v. *United States*, 168 F.Supp. 706, at 708 (D.C.N.D. Ill., 1958), or whether by motion of appellant as in *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939). In the instant case, as in the *Janesville* decision, a court's duty to inquire into the merits of the rights under paragraph 6 upon such an occasion is not excused by the consent originally accorded the order as a whole.

The appeal at bar is taken to rectify the error of the lower court and to obtain an adjudication of whether appellant's right to the unclaimed fares is superior to appellees' rights to attorneys' fees therefrom. Appellant seeks, not merely a review of such a determination already had in the cause, as appellees contend, but an original declaration of ownership in such fund. Appellant seeks its first "day in court" on the issues raised hereby.

III.

The Proceedings in February, 1958, Do Not Foreclose Appellant's Right to the Unclaimed Fares.

A. Appellee Association Relies on the Doctrine of Collateral Estoppel.

Appellee Commuters' Association contends, at pages 10-12 of its Motion to Affirm, that the issues raised by this appeal were adjudicated by the proceedings had in this cause before the district court in February, 1958. It cites no authority for such assertions. Neither does it expressly invoke the familiar principles of *res judicata* or collateral estoppel, although it appears to rely upon the latter. This Court stated in *Commissioner* v. *Sunnen*, 333 U.S. 591, at 598, 68 S.Ct. 715, 92 L.ed. 898, at 906 (1948):

> "Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel."

The essence of appellee's argument is that the duel over ownership of the presently unclaimed fares has already been fought and resolved adversely to appellant by the district court's order of February 28, 1958.

In *Yates* v. *United States*, 354 U.S. 298, at 336, 77 S.Ct. 1064, 1 L.ed. 2d 1356, at 1385 (1957), this Court summarized the doctrine of collateral estoppel as follows:

"That doctrine makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision."

Cromwell v. *County of Sac*, 94 U.S. 351, 24 L.ed. 195 (1877), was an action on four bonds and coupons in which the county's defense was estoppel by a prior judgment in its favor in a suit brought by a different party on earlier maturing coupons of the same bonds. The judgment in the prior suit was based upon fraud and the fact that plaintiff was not a *bona fide* holder in due course and for value. In the second suit the plaintiff was clearly a holder in due course. This Court distinguished estoppel by judgment precluding later litigation of the same claims from estoppel upon a different claim. At 94 U.S. 352-353, 24 L.ed. 197-198, the opinion stated:

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . .

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

In the case at bar, therefore, the first inquiry must be whether the questions litigated in the proceedings of February, 1958, are the same as those raised by this appeal.

B. Facts and Issues Presented By This Appeal Were Not Resolved By the Order of February 28, 1958.

Paragraph 4 of the order of June 18, 1956, provided:

> "If the decree is affirmed or the appeal is dismissed or discontinued, the Milwaukee Road shall post immediately in its suburban stations, notice that refund will be made of the excess fares to the persons who have paid them."

That order did not contemplate a decision of this Court on grounds requiring remand of the cause for further proceedings before the Commission. What the parties contemplated in June, 1956, was an outright affirmance or reversal on appeal of the lower court's decree on the grounds expressed in its 1956 opinion. *State of Illinois* v. *United States*, 146 F.Supp. 195 (D.C.N.D. Ill., 1956). See Jurisdictional Statement, pages 5-6. That did not occur; this Court held on appeal:

> ". . . we do not think that the deficit from this single commuter operation can fairly be adjudged to work an undue discrimination against the Milwaukee Road's interstate operations without findings which take the deficit into account in the light of the carrier's other intrastate revenues from Illinois traffic, freight and passenger." *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, at 307-308, 78 S.Ct. 304, 2 L.ed. 2d 292, at 299 (1958).

Thus, the basis for the remand by this Court was entirely unrelated to the basis upon which the lower court had set aside the Commission's order in *Chicago Intrastate Suburban Fares, Milwaukee Railroad*, 297 I.C.C. 353 (1955).

This Court's remand of the cause, consequently, was unexpected and unforeseen by the parties. The order of June 18, 1956, did not provide for disposition of the impounded funds in such event, and left a void which appellant sought to fill by delaying any action under the stay order until the final decision it contemplated should be accomplished by a later order of the Commission.

Appellant's motion of February 10, 1958, requested the district court to:

> " . . . further stay the injunction prescribed by its decree entered June 14, 1956, and to order said defendant to continue the impounding of fares, as is now being done . . ."

Contrary to the statement of appellee Commuters' Association, at page 10 of its Motion to Affirm, appellant's motion did not seek relief from the obligation imposed by the stay order. Appellant did not seek thereby to reverse the terms of that order so that refunds never would have to be made; it did not seek to obtain the impounded fund. Appellant desired only a continuation of the status quo until the proceedings on remand could be completed.

Appellant's motion in the lower court for a stay or supersedeas pending appeal of the order of February 28, 1958, requested merely:

> " . . . a stay of the time for compliance with the injunction prescribed by decree of this Court entered June 14, 1956 and with the provisions of its order of June 18, 1956 insofar as said decree and order require immediate refund of impounded monies heretofore collected pursuant to order of the Interstate Commerce Commission."

At no time during the proceedings in February, 1958, was there mentioned the subject of appellees' rights to attorneys' fees under paragraph 6 of the order of June

18, 1956. The subject matter of the present litigation, the unclaimed fares, did not come into existence until the end of the refunding period on August 28, 1958.

In its brief opposing appellant's motion of February 10, 1958, appellee Association mentioned only those parts of the stay order relating to refunds of the impounded fares to those who paid them. Its concluding statement, pages 33-34, was:

> "We submit that the Milwaukee Road's motion should be denied, and that it should be directed to comply with the decree of this Court enjoining it from charging the increased fares specified in the invalid order of the ICC and to take immediate steps to refund the impounded funds as required by the stay order of June 18, 1958."

What appellee Association sought in opposing appellant's said motion was, not an allowance of attorneys' fees, but the refund of the impounded monies to the suburban passengers.

At pages 4-5 of its brief opposing appellant's request to this Court for supersedeas, *Chicago, M., St. P. & P. R. Co.* v. *Illinois*, 356 U.S. 906, 78 S.Ct. 665, 2 L.ed. 2d 573 (1958), the Association again discussed the order of June 18, 1956, without mentioning the provision concerning reasonable expenses of the parties. There again, the Association concerned itself only with the question whether refunds should be made to suburban riders. The concluding paragraph of that brief states, at page 27:

> "The obligation of the Milwaukee Road to refund the impounded excess fares held by it as trustee or escrow agent, is clear and must be complied with. There is no basis for issuance of a supersedeas or stay order that will relieve the Milwaukee Road from immediate compliance with that obligation."

Thus the only question which was considered in February, 1958, was that of immediate refunds of fares to the persons who paid them.

Nor is appellee Association aided by the fact that the appeal from the district court's order of February 28, 1958, was not prosecuted to a final conclusion. Appellant dismissed its appeal to this Court from the order of February 28, 1958, because a successful appeal would have been a hollow victory. The impounded fares became immediately available to proper claimants. Had this Court eventually reversed the order, the monies already would have been disbursed. To recapture them from individual claimants would have been impossible. The subject matter of the litigation would not have been in existence at the time the appeal was decided. Thus, after the denial of appellant's petition for a stay or supersedeas, the appeal was moot.

C. Appellees May Not Rely on the February, 1958, Litigation to Deny Appellant's Right To the Unclaimed Fares.

The estoppel asserted by appellee Association does not extend beyond the issue at bar in February, 1958. As this Court stated in *Cromwell* v. *County of Sac*, 94 U.S. 351, at 354, 24 L.ed. 195, at 198 (1877):

> "These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined."

Thus, the present question of ownership of the *unclaimed* excess fares was not determined by the proceedings in February, 1958.

That the present issues properly might have been raised and adjudicated in those proceedings is immaterial. This point was also mentioned in the *Cromwell* case, at page 356 of 94 U.S., 199 of 24 L.ed.:

> "It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.
>
> "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Therefore, regardless of the prior judicial determination that the order of June 18, 1956, required *refunds* to be made, the fact that appellees' attorneys' fees and appellant's rights in the unclaimed fund were not raised in February, 1958, leaves them open for adjudication on this appeal.

Following the *Cromwell* case, this Court held that where new or changed circumstances not present in an earlier

action constitute a defence, the first judgment does not estop their assertion in a later suit. *Nesbit* v. *Riverside Independent District,* 144 U.S. 610, 12 S.Ct. 746, 36 L.ed. 562 (1892). Also an action on bonds, this case involved a defense in the prior suit that certain recitals in the bonds prohibited a showing by the municipality that they were an overissue under the state constitution. The second suit was on other bonds of the same issue in which was proved the additional fact that the municipality had constructive notice of the overissue. This Court stated at 144 U.S. 620, 36 L.ed. 566:

> "The effect of recitals is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others."

Similarly, in the instant appeal, the estoppel asserted by appellees is precluded because there are now involved additional facts previously unknown, namely, that the fund is now, but previously was not, unclaimed and that the Commission's findings of October 31, 1958, theretofore non-existent, again justified increased fares. The questions here are new and different from those considered in February, 1958.

The decisions just quoted were reaffirmed by this Court in *Commissioner* v. *Sunnen,* 333 U.S. 591, 68 S.Ct. 715, 92 L.ed. 898 (1948). The question in this case was whether income during the years 1937-1941 from certain royalties which Sunnen had assigned to his wife was taxable as income to him. In an earlier proceeding the Tax Court concluded that Sunnen was not taxable on royalties paid to his wife during the years 1929-1931. Citing the *Cromwell* decision, this Court held, at 33 U.S. 597-598, 92 L.ed. 906:

> "But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'"

This decision suggested the basis for collateral estoppel, at page 599 of 333 U.S., 907 of 92 L.ed.:

> "That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers."

Appellees thus may not create a vested right to receive attorneys' fees from the unclaimed fund by reliance on the obsolete proceedings of more than a year ago.

A similar tax case is *Stanback* v. *Robertson*, 183 F.2d 889, (C.C.A. 4, 1950), *certiorari denied*, 340 U.S. 904, 71 S.Ct. 280, 95 L.ed. 654 (1950). This suit was to recover income taxes allegedly assessed wrongfully against a family partnership for the year 1941. The question before the court of appeals was the validity of the partnership for tax purposes. A prior proceeding in the Tax Court had involved the same parties and partnership agreement, but it dealt with the question of tax liability for the years 1938 and 1939. In that prior determination, no question was raised as to the validity of the partnership arrangement. Citing the *Cromwell* and *Sunnen* decisions, the Court held at 183 F. 2d 894:

> "The Tax Court in the Stanback cases was concerned only (as was the Supreme Court in the Clifford case) with the question of the allocation of income for tax purposes and never commented on the question of the validity of the partnership for tax purposes, the fundamental issue in the case now before us. As we have already pointed out, collateral estoppel can be invoked only where the same issue has actually been previously litigated. Here the precise issue before us has not been previously adjudicated. . . ."

In this case, likewise, no question was raised in the litigation of February, 1958, concerning appellees' rights to attorneys' fees. The parties' rights in the unclaimed fares were not then before the court, and those proceedings do not estop appellant to request that they be decided without reference thereto and on the merits.

IV.

The Findings of the Interstate Commerce Commission on October 31, 1958, Remain in Full Effect; the Doctrine of Atlantic Coast Line v. Florida Applies.

Appellee Association argues that the "order" entered by the Interstate Commerce Commission on October 31, 1958, pursuant to *Chicago Intrastate Suburban Fares of Milwaukee Road,* 305 I.C.C. 73 (1958), See Appendix C, Jurisdictional Statement, pages 21a-22a, has no present effect. Brief for Appellee 7-8, 13. This statement is not correct. Appellant's petition for increased fares has not been stricken; the proceedings before the Interstate Commerce Commission were not discontinued; the report and findings of the Interstate Commerce Commission still remain a matter of record; and the identical fares ordered by the Commission are now in effect.

The vacation order is set out herein as Appendix A, page 1a, *infra*, and merely reflects the policy of the Interstate Commerce Commission, based on principles of comity, to allow a state to regain jurisdiction over intrastate fares which, unlike appellant's previous suburban fares, are not in violation of federal law.

The decisive fact which appellee overlooks is that the recent vacation order left in effect the report of the Interstate Commerce Commission, including its findings. Appendix C, page 17a-18a, Jurisdictional Statement. Under the doctrines expressed in *Atlantic Coast Line* v. *Florida*, 295 U.S. 301, 55 S.Ct. 713, 79 L.ed. 1451 (1935), and *United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939), it is the findings of the Commission on remand which are controlling and upon which appellant bases its right to receive the present unclaimed fares.

A. Atlantic Coast Line v. Florida.

That no impounded fund was involved in the *Atlantic Coast Line* case does not distinguish it from the instant litigation. This Court contrasted the third *Morgan* case with *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 60 S.Ct. 325, 84 L.ed. 361 (1940), in *Addition* v. *Holly Hill Co.*, 322 U.S. 607, at 621, 64 S.Ct. 1215, 88 L.ed. 1488, at 1498 (1944), where the opinion stated:

> "If it be said that in the *Morgan* case the Court was dealing with a fund in court—irrelevant though that be to the governing principles of that decision—no such constriction can be made of the import of our decision in *General American Tank Car Corp.* v. *Terminal Co.* . . ."

Both of these cases were suits to recover sums allegedly due the respective claimants.

The instant case is merely the obverse of the *Atlantic Coast Line* case. Here the excess charges are claimed by

a railroad; there, by a railroad's patrons. In neither case does the impounding of the excess charges or the absence thereof affect the "color of right" obtained by their collection. *cf. United States* v. *Morgan*, 307 U.S. 183, 59 S.Ct. 795, 83 L.ed. 1211 (1939).

B. United States v. Morgan.

Appellee Association strives to evade the application of the doctrine of the *Morgan* case by suggesting differences where none exist. It attempts to distinguish the third *Morgan* case as turning on the meaning and application of the provisions of the Packers and Stockyards Act which, it says, differs materially from the Interstate Commerce Act. Apparently the Association failed to take the precaution of comparing Section 310 of the Packers and Stockyards Act under which the Secretary acted, with Section 15 of the Interstate Commerce Act which authorized the Commission to prescribe the fares in the present proceeding. It would have found, had it done so, that the language of the first mentioned section is to be found nearly word for word in the latter.

The Packers and Stockyards Act, Section 310, 42 Stat. 166, 7 U.S.C. Sec. 211, provides:

> "Whenever after full hearing upon a complaint made as provided in section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed."

Section 15 (1) of the Interstate Commerce Act, 54 Stat. 911, 49 U.S.C. Section 15 (1), provides:

"Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable indi-

vidual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed."

Further, Section 316 of the Packers and Stockyards Act, 42 Stat. 168, 7 U.S.C. Sec. 217, states that for the purpose of certain sections of the act under which the Secretary exercised his powers:

". . . the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of said sections, and to any person subject to the provisions of said sections."

C. The October 31, 1958, Findings of the Interstate Commerce Commission Here Involve No Objectionable Retroactive Effect.

In the *Atlantic Coast Line, Inland Steel,* and *Morgan* cases, the fact that later determinations governed the disposition of funds collected beforehand was not fatal to the equitable rights so confirmed. If the application of such authority to the present issues constitutes retroactivity, it

does so in a special, limited, unoffensive sense of the word. That it does no injustice to the law is apparent from this Court's decision in *Addison* v. *Holly Hill Co.*, 322 U.S. 607, at 622, 64 S.Ct. 1215, 88 L.ed. 1488, at 1498 (1944):

> "The petition for rehearing claimed that our decision involved retroactivity. 309 U.S. 694. So it did. But as against retroactivity we balanced the considerations that made retroactivity seem the lesser evil."

The *Addison* case was a suit brought under the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C. Sec. 201 *et seq.*, by employees of the company against their employer for wages. Liability depended in part upon whether a definition of the administrator had created an exemption from the Act by virtue of the number of workers employed. This Court remanded the cause with instructions to continue it until the administrator could make a valid determination of the geographical area in which the exemption was effective. The argument advanced against this disposition was that such a subsequent determination of the administrator, in a suit involving private parties only, would constitute retroactivity. At 322 U.S. 620, 88 L.ed. 1497-1498, the decision stated:

> "The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactivity as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design."

The *Addison* case expressly points out the retroactive effect of the decisions in the *Atlantic Coast Line, Inland*

Steel and *Morgan* cases. It cites them with approval and follows them in disposing of the issues there at bar. We urge that such retroactivity as is here present is not fatal to appellant's contention that the second order of the Commission has confirmed its "color of right" to the unclaimed excess fares acquired by its collection of them under the first order.

In the fourth *Morgan* case, *United States* v. *Morgan*, 313 U.S. 409, 61 S. Ct. 999, 85 L. ed. 1429 (1941), the market agencies made the same contention as does the Association in the instant case, that the Secretary could make no retroactive order. This Court said, at 313 U.S. 416, 85 L.ed. 1432:

> "He neither purported to make nor did he make a *nunc pro tunc* order. The Secretary thus adopted a procedure which admitted whatever light was shed by change of circumstances after 1933. The market agencies freely availed themselves of this procedure; and the Secretary's findings leave no room for doubt that his conclusions represent a judgment of 1939 and not a prophecy of 1933."

Retroactivity within the scope of the cited decisions is not fatal when it assists in determining the equities of a situation. Those decisions apply in this appeal to confirm appellant's rights in the unclaimed fares.

CONCLUSION.

On the authorities cited at pages 4 to 11 hereof this Court has jurisdiction of the present direct appeal. Appellant, therefore, requests this Court to deny the Motion to Dismiss of appellees, the State of Illinois and Illinois Commerce Commission.

On the foregoing arguments and authorities, appellant contends that the provisions of the lower court's order of June 18, 1956, and the litigation of February, 1958, do not render the issues raised on this appeal manifestly unsubstantial. Appellees obtained no rights to the present unclaimed fares by the order of June 18, 1956, and no such right could have been affirmed by the proceedings in February, 1958. Consideration of the questions on this appeal on their merits, therefore, is not foreclosed by prior proceedings in this cause. The questions raised hereby consequently are substantial, as stated in appellant's Jurisdiction Statement, pages 8 to 12.

Appellant requests this Court to deny the motions of appellees to affirm the order of December 24, 1958. Appellant further requests this Court to note probable jurisdiction of this cause and order that it shall stand for argument on the merits of the questions presented.

Respectfully submitted,

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888 Union Station Building
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May 12, 1959

APPENDIX A.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 20th day of March, A. D., 1959.

No. 31742

CHICAGO INTRASTATE SUBURBAN FARES OF MILWAUKEE RAILROAD

No. 11703

IN THE MATTER OF INTRASTATE RATES WITHIN STATE OF ILLINOIS

It appearing, That on October 31, 1958, the Commission issued its report and order on further hearing in this proceeding, requiring, under a finding of unjust discrimination against and undue burden on interstate commerce, certain increased intrastate fares to be established and maintained on and after February 6, 1959, and modified its outstanding orders in No. 11703 *Intrastate Rates Within Illinois,* 59 I.C.C. 350, so as to permit this to be done;

It further appearing, That on December 8, 1958, protestants filed a petition for reconsideration, and that on December 29, 1958, respondent filed a reply to protestants' petition;

It further appearing, That on December 10, 1958, respondent filed schedules establishing such increased fares with the Illinois Commerce Commission, and that on January 8, 1959, that Commission approved such fares and they are now in effect;

It further appearing, That on January 14, 1959, certain protestants filed a motion to vacate as moot our order of October 31, 1958, and to dismiss respondent's original petition upon which this investigation was instituted, and that on February 3, 1959, respondent filed a reply to the motion;

And it further appearing, That there is no error in fact or law in said report and order of October 31, 1958, but that there is no necessity for an affirmative order in this proceeding so long as these increased fares continue in effect, and that, as a matter of comity, said order should be vacated in the respects indicated below:

It is ordered, That our order of October 31, 1958, be, and it is hereby, vacated and set aside, except insofar as it modifies the said outstanding orders in No. 11703, Intrastate Rates in Illinois, 59 I.C.C. 350; that the said petition of December 8, 1958, be denied and that said motion of January 14, 1959, be overruled in all other respects.

By the Commission.

Harold D. McCoy
Secretary

(Seal)